80-1207

No._____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID RUSK, MAYOR, et al., *Appellants*

v.

JOSEPH ESPINOSA, et al., *Appellees*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JURISDICTIONAL STATEMENT

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January 5, 1981

QUESTIONS PRESENTED

Did the lower court err by concluding that, as applied to Appellees, Albuquerque Ordinance No. 72-1975, which regulates the solicitation of funds within the City for charitable purposes, violates the First and Fourteenth Amendments of the United States Constitution because the ordinance:

a) contains a prohibited religious test and impinges upon Appellees' right of free exercise where the result of that religious test is *not* the denial of the right to disseminate religious views; and

b) is not a reasonable regulation governing the solicitation of funds by Appellees?[1]

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[1] The parties to the proceedings in the United States Court of Appeals for the Tenth Circuit were: David Rusk, Mayor; Patrick Baca, Joe R. Abeyta, Mel Aragon, Thomas W. Hoover, Sandra L. West, Alan B. Reed, Jo McAleese, Jim Delleney, Marion M. Cottrell, members of the City Council of the City of Albuquerque, New Mexico; and Bob V. Stover, Chief of Police of the City of Albuquerque, New Mexico (Defendants-Appellants in the court below and Appellants herein); Joseph Espinosa, Charles Shobe, Morton L. Dunkin, and General Conference Corporation of Seventh-day Adventists (Plaintiffs-Appellees in the court below and Appellees herein).

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JOSEPH ESPINOSA, et al., *Appellees*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States Court of Appeals for the Tenth Circuit, entered on October 21, 1980, holding that Albuquerque Ordinance No. 72-1975, which regulates the solicitation of funds for charitable purposes, violates the First and Fourteenth Amendments of the United States Constitution.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, which appears in the appendix hereto, p. 1a, *infra*, has not been reported.

The memorandum opinion of the United States District Court for the District of New Mexico, which appears in the appendix hereto, p. 15a, *infra*, is not reported.

JURISDICTION

Jurisdiction in the United States Court of Appeals for the Tenth Circuit was based upon 28 U.S.C. §1291. Jurisdiction in the United States District Court for the District of New Mexico was based upon 28 U.S.C. §1343 (3).

The judgment of the United States Court of Appeals for the Tenth Circuit, affirming the decision of the United States District Court for the District of New Mexico permanently enjoining the enforcement of Albuquerque Ordinance No. 72-1975 insofar as it applied to Appellees' Ingathering program, was entered on October 21, 1980.

A notice of appeal to this Court was filed in the United States Court of Appeals for the Tenth Circuit on December 27, 1980. See p. 26a, *infra*.

This appeal is being docketed in this Court within 90 days of the entry of the judgment below. The jurisdiction of this Court is being invoked under 28 U.S.C. §1254 (2).

CONSTITUTIONAL PROVISIONS AND ORDINANCES

First Amendment, United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Fourteenth Amendment, United States Constitution:

[N]or shall any State deprive any person of . . . liberty . . . without due process of law. . . .

Albuquerque Ordinance No. 72-1975:

The text of the ordinance appears in the appendix hereto, p. 28a, *infra*.

STATEMENT OF THE CASE

The City of Albuquerque enacted Ordinance No. 72-1975 to regulate charitable solicitations within the city limits. Among the ordinance's stated purposes is preventing deceptive and dishonest statements and fraudulent conduct in connection with such solicitations. The ordinance establishes a permit system which is described below.

If a solicitor does not fall within an enumerated exemption, the solicitor is required to obtain a permit from the Albuquerque Solicitations Review Board (hereinafter, "the Board") before soliciting contributions. Ordinance No. 72-1975, Section 7. To obtain a permit, the solicitor must file an application containing certain documentation and information, including: the name of the charitable organization and the name under which it intends to solicit contributions; the names and addresses of the organization's national and local directors, trustees, and officers and local key personnel; the location of the organization's financial records; the methods by which the solicitation will be made; the names and addresses of any professional fund raisers acting on the organization's behalf; the general purpose for which the organization is organized; where and when the organization was legally established, the form of the organization, and the organization's federal exempt status; the purposes for which the contributions to be solicited will be used, and the total amount of funds proposed to be raised; the time during which the solicitation will be made; a financial statement of charitable collections made by the applicant during the preceding fiscal year; whether the organization is authorized by any governmental authority to solicit contributions, and whether it is or has ever been enjoined by any court from soliciting contributions. Ordinance No. 72-1975, Section 8.A-K. The ordinance also

authorizes the Board to obtain "[s]uch other information as may be reasonably required by the Board . . . provided that disclosure of names of donors or amounts of contributions shall not be required." Ordinance No. 72-1975, Section 8.L.

The Board then must determine whether the cost of the solicitation will exceed 30% of the gross amount to be raised; whether the advertising material and general promotional plan are false, misleading or deceptive; and whether the organization or its officers have been convicted of a crime involving charitable solicitations within the past ten years. In the case of application renewals, the Board also must determine whether the organization has complied with the provisions of the ordinance during the preceding calendar year. Ordinance No. 72-1975, Section 10. The permit *must* be granted if 45 days pass without action or if the Board determines that the application is complete and that the answers to the questions noted above are negative. Ordinance No. 72-1975, Section 11. If the application is approved, the applicant is required to pay a permit fee of $25.00. Ordinance No. 72-1975, Section 12.

If the Board determines that one of these very specific requirements has not been satisfied, the Board must notify the applicant that the application must be corrected with respect to specified deficiencies. Only if the requested corrections are not made, may the permit be denied. The denial must include the findings of fact which were the basis for the denial. The denial is not effective for 20 days, and during that time the applicant may petition for reconsideration and is entitled to a hearing. Ordinance No. 72-1975, Section 11.

The ordinance contains various exemptions, including one for:

> Solicitations by religious organizations which are entitled to receive a declaration of current tax exempt status from the government of the United States and their duly organized branches or chapters . . . if the solicitations are in the form of . . . solicitations by such organizations solely for evangelical, missionary, or religious but not secular purposes.

Ordinance No. 72-1975, Section 3.A.

The ordinance further defines "secular" as "not spiritual or ecclesiastical but rather relating to the affairs of the present world, such as providing food, clothing and counselling." Ordinance No. 72-1975, Section 2.L. One of the Board's enumerated powers is to "[d]etermine whether or not an organization is exempt from the provisions of . . . [the] ordinance and interpret upon request any provision of . . . [the] ordinance." Ordinance No. 72-1975, Section 6.G.

Any person violating any of the provisions of the ordinance will be deemed guilty of a misdemeanor. Ordinance No. 72-1975, Section 24.

This controversy began when the Seventh-day Adventist Church contacted the City in order to ascertain whether Ordinance No. 72-1975 applied to activities associated with the Church's annual solicitation drive, known as the Ingathering. The City informed the Church that many of the activities were secular and that the Church was required to conform to the ordinance's permit requirement. The Church was willing to provide the City with certain information required by the ordinance but refused to submit an application for a permit.

The Church and certain of its individual members then filed an action in the United States District Court for the District of New Mexico in which they sought injunctive and declaratory relief pursuant to 42 U.S.C. §1983. The parties stipulated to the pertinent facts, including those facts which are noted below.

The Church conducts an annual Ingathering program in most countries. During this drive, the members of the Church attempt to bring their spiritual message into every home in the nation. The members distribute literature and solicit contributions. In addition to evangelical purposes, the contributions are to be spent to provide food, clothing, shelter and money for the needy; summer camps for disadvantaged youth; counseling; health services; and education. The City advised the Appellees that the latter would all come within the meaning of "secular" as that term is defined in the ordinance and interpreted by the City. For the purposes of the ordinance, the Ingathering program has no costs.

The Church and the individual Appellees believe that the welfare programs which are funded by the Ingathering program constitute part of their biblical mission. They also believe that the door-to-door contacts during the solicitation with the citizens of Albuquerque are an important aspect of the free exercise of their religious beliefs as guaranteed by the First and Fourteenth Amendments of the United States Constitution.

The parties further stipulated that the Church is a "charitable organization" within the meaning of the ordinance. Appellees conceded that the protection of the public from fraud is a legitimate interest of the City.

The questions presented to this Court were raised in the pleadings filed in the District Court. The District Court found that the ordinance, as applied, embodies a religious test in violation of the First and Fourteenth Amendments. The court permanently enjoined the City from enforcing the ordinance insofar as the Ingathering program was concerned.

The City then appealed to the United States Court of Appeals for the Tenth Circuit. By way of briefs and oral argument, the questions herein were presented to that court. In a 2-1 decision, the court affirmed the lower court's decision, concluding, *inter alia*, that the ordinance embodies a prohibited religious test.

THE QUESTIONS ARE SUBSTANTIAL

The City of Albuquerque promulgated Ordinance No. 72-1975 in order to protect its citizens from fraudulent and deceptive practices in connection with charitable solicitations. Unlike a number of the charitable solicitation ordinances which this Court has reviewed and found constitutionally wanting, the ordinance in question was carefully drafted with an eye towards avoiding problems of vagueness and providing very specific standards. Clearly one of the principal public concerns addressed in the ordinance was an attempt to balance the interrelationship between that which is religious and that which is secular to protect the public against solicitations in the name of religion for secular purposes. Such a regulation necessarily raises sensitive constitutional questions, particularly with respect to the right of free exercise guaranteed in the First Amendment. While this Court has considered similar questions, the City submits that the questions presented in

this case are of first impression and are so substantial that they justify plenary review by this Court.

This Court consistently has recognized that the state has an important interest in protecting its citizens from the fraud and undue annoyance which may be associated with charitable solicitations. See, *Hynes v. Mayor of Oradell*, 425 U.S. 610, 616-619 (1976); *Cantwell v. Connecticut*, 310 U.S. 296, 306-307 (1940). The Court has also consistently indicated that such a regulation must be drawn with specificity, must not "vest in municipal officials the undefined power to determine what messages residents will hear," must not involve any "religious test," and must "not unreasonably obstruct or delay the collection of funds." See, 425 U.S. at 617; 310 U.S. at 305.

The City submits that the lower courts erred by not concluding that Ordinance No. 72-1975 is a reasonable regulation which satisfies the aforementioned constitutional standards. The ordinance in question is very narrowly drawn and does not vest unbridled discretion in the Albuquerque Solicitations Review Board. The requirements of the ordinance are reasonably related to a legitimate governmental purpose, and any burden upon religious organizations which must comply with the ordinance's permit requirement is *de minimis*. Most importantly, a determination, under the ordinance, that the purposes for which funds are solicited are not "evangelical, missionary or religious" does *not* render solicitation by a group claiming some religious affiliation unlawful or deny that group the right to disseminate religious views. Quite to the contrary, if the Albuquerque Solicitations Review Board finds in the light of the definition of "secular" that the purposes of a solicitation by a group claiming some reli-

gious affiliation are secular, the only consequence of that determination is that the group must obtain a permit and *disclose* to the public how the money solicited will be used.

The lower courts relied upon the *Cantwell* case as controlling because, in their view, Ordinance No. 72-1975 embodies a religious test which constitutes an impermissible prior restraint upon the free exercise of religion. However, reliance upon *Cantwell* is misplaced because that case is critically different from this one. Ordinance No. 72-1975 does not vest indiscriminate power in City officials to determine whether an organization is religious. The ordinance defines the term "secular"[2] and thereby excludes particular activities from the exempt category of solicitations for "evangelical, missionary or religious" purposes. However, this definition does not result in the evil which this Court sought to eliminate in *Cantwell*: the potential denial of the right to disseminate religious views.

If *Cantwell* is to be read that *any* administrative determination as to what is religious is objectionable, then the consistent statements of this Court that the state has an important interest in protecting its citizens from the fraud and undue annoyance which may be associated with charitable solicitations are meaningless. One must look to the *consequences* of such an administrative determination. To do otherwise would be to allow an individual to define his own religion and to exercise his individual beliefs free

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[2] This Court has expressly recognized the difference between the "secular" and "religious" activities of religious organizations. See, *Committee for Public Education v. Nyquist*, 413 U.S. 756, 775 (1973); *Walz v. Tax Commission*, 397 U.S. 664, 687-689 (1970). In neither of these cases was the recognition of this distinction considered to work a censorship of religion.

from governmental restraint of any type. That does not make sense and that does not comport with the consistent holdings of this Court.

This Court has indicated that a properly drawn regulation of the type at issue in this case may pass constitutional muster. However, such regulations have consistently failed to do so. The City of Albuquerque submits that Ordinance No. 72-1975 is constitutional. The ordinance in question presents the Court with an appropriate vehicle for further refining the law so that municipalities will be able to formulate ordinances which satisfy both the need of their citizens to be protected against fraud and the strictures of the First Amendment.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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